UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UBALDO ROMERO,	:	
Petitioner,	:	08 Civ. 8380 (CM)(HBP)
-against-	:	OPINION AND ORDER
DAVID NAPOLI, Superintendent for Southport Correctional Facility,	:	
Respondent.	:	

PITMAN, United States Magistrate Judge:

By motions dated May 11 and August 17, 2009 (Docket Items 27 and 29, respectively), petitioner moves for discovery and evidentiary hearing. For the reasons set forth below, the former motion is denied without prejudice to renewal in the event that petitioner's double jeopardy claim is ultimately found not to be procedurally barred. The latter motion is denied.

Petitioner was convicted of two counts of murder in the second degree and was sentenced to two consecutive sentences of 25 years to life. Based on the description of petitioner's case set forth in the decision of the New York Court of Appeals affirming petitioner's conviction, the evidence offered at trial established that petitioner was a participant in a narcotics distribution conspiracy in northern Manhattan and that he and others (including a 14-year-old boy) shot and killed two individ-

uals who were believed to be about to rob one of petitioner's street dealers. See generally People v. Romero, 7 N.Y.3d 633, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006). Petitioner was tried twice on these charges because the jury was unable to reach a unanimous verdict as to petitioner at the conclusion of the first trial. Petitioner asserts three claims: (1) the evidence was insufficient to sustain the verdict; (2) petitioner's double jeopardy rights were violated by the retrial because the evidence at first trial was insufficient sustain a conviction, and (3) petitioner deprived of due process because the indictment failed to allege the essential elements of offense and, therefore, failed to apprise petitioner what he had to confront at trial. Respondent argues, among other things, that the second and third claims are procedurally barred.

Petitioner's motion to compel discovery arises in connection with his double jeopardy claim. As I noted earlier in my May 4, 2009 opinion denying petitioner's application for the appointment of counsel, even if the evidence at petitioner's first trial were found to be insufficient to prove the charges against petitioner, the double jeopardy clause would not bar a second trial. United States v. Ustica, 847 F.2d 42, 48 (2d Cir. 1988).[1]

[1]The Second Circuit explained in Ustica that an evidentiary deficiency at a criminal defendant's trial that results in a hung (continued...)

Ustica does not apply, however, where the prosecution

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[1](...continued)
jury does not preclude the defendant's retrial.

> [T]he Supreme Court has determined that where there has been a mistrial because of a hung jury, the Double Jeopardy Clause does not bar retrial -- regardless of any evidentiary insufficiency at the first trial. Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). In Richardson, the Court explained that unlike an appellate reversal on insufficiency grounds, a mistrial because of a hung jury is not an "event" that terminates the original jeopardy to which the defendant was subject. Therefore, following such a mistrial, even if an appellate court could determine that the prosecution's evidence was insufficient to support a conviction, a defendant nonetheless has no valid double jeopardy claim:
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> > Since jeopardy attached here when the jury was sworn, petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy . . . . [W]e hold . . . that the failure of the jury to reach a verdict is not an event which terminates jeopardy.
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> > * * *
> >
> > The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.
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> Id. at 325-26, 104 S.Ct. at 3086-87 (citations omitted) (emphasis added).

United States v. Ustica, supra, 847 F.2d at 48.

intentionally engages in misconduct in order to provoke a motion for a mistrial and thereby avoid a likely acquittal.

> The Second Circuit has . . . clarified the standard for a double jeopardy claim based on prosecutorial misconduct. In United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993), the Second Circuit, citing Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), held that double jeopardy bars a retrial when the prosecutorial misconduct "giving rise to the mistrial was intended to goad or provoke [the defendant] into moving for the mistrial." Pavloyianis, 996 F.2d at 1473. The Second Circuit held that when, as in the case at the bar, the alleged prosecutorial misconduct did not cause a mistrial, double jeopardy bars a retrial "only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." Id. at 1474 (quoting United States v. Wallach, 979 F.2d 912, 915-16 (2d Cir. 1992), cert. denied, 508 U.S. 939, 113 S.Ct. 2414, 124 L.Ed.2d 637 (1993)).

United States v. Gambino, 838 F. Supp. 744, 746 (S.D.N.Y. 1993). Petitioner now seeks to conduct discovery in an effort to come within the principle discussed in Gambino.

Although the applicability of the exception discussed in Gambino appears questionable given the fact that the mistrial here resulted from the jury's inability to reach a verdict and did not result from a defense motion, petitioner's motion for discovery minimizes the significance of respondent's procedural bar argument, which is not dependent on any unresolved factual issues and may entirely moot the need (if any) for the discovery petitioner now seeks. Given the breadth of the discovery petitioner seeks and the fact that the discovery sought will unques-

tionably be irrelevant if respondent's procedural bar defense proves successful, I conclude the more efficient course here is to deny the petitioner's motion for discovery without prejudice to renewal if petitioner's double jeopardy claim survives respondent's procedural bar argument.

Petitioner's motion for an evidentiary hearing is frivolous. Petitioner seeks the hearing "to determine whether [certain evidence cited by petitioner] outweighs the presumption of correctness [afforded] to the state court's factual determination of the sufficiency of the evidence involved in this case . . ." (Petitioner's Affirmation in Support of his Motion for an Evidentiary Hearing at 31-32 (annexed to Docket Item 29)). The sufficiency of the evidence is determined by comparing the elements of the offence of conviction to the evidence offered at trial, and, after viewing the evidence in the light most favorable to the prosecution, determining whether "any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). A federal habeas corpus court cannot generally revisit a jury's assessments of the weight of the evidence or the credibility of witnesses. See Quartararo v. Hanslmaier, 186 F.3d 91, 95, 96 (2d Cir. 1999), citing Herrera v. Collins, 506 U.S. 390, 401 (1993) (federal habeas courts must not assume "the position of a thirteenth juror;" "inconsistencies were for the

jury to resolve" not the district court). In assessing a sufficiency claim, there is simply is no factual issue that warrants an evidentiary hearing.

Accordingly, for all the foregoing reasons, petitioner's motion to compel discovery (Docket Item 27) is denied without prejudice to renewal if petitioner's double jeopardy claim is ultimately found not to be procedurally barred. Petitioner's motion for an evidentiary hearing (Docket Item 29) is denied.

Dated: New York, New York
March 8, 2010

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

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